DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

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March 7, 2004

Sen. Carpenter:

By offering a series of amendments, especially this one, that are rejected, you run the risk that the courts will use the rejections in interpreting legislative intent and thereby interpret the provisions more broadly restrictive than they would otherwise. However, the courts are not required to consider the rejection of amendments in their deliberations relating to the meaning of the provisions. Even if the courts use the rejections, rejections are not always a strong and reliable indication of legislative intent. Regardless of whether the courts use the rejections in their analysis, I assume that the proponents of the amendment will bring them to the attention of the courts.

The real issue about the use of legislative actions and materials to interpret the constitution is not the general statement that the courts are required to interpret the constitution to carry out the intent of the legislature and voters, but what is the context they should review to decide that issue presented. Should it be the wording alone, or should the context also include all written material that the legislature had before it when working on the amendment, or should it also include the historical or economic situation that produced the push for its enactment?

The standard in Wisconsin for interpreting the constitution uses a broader context than that for interpreting statutes, although some cases interpreting statutes use the broader context. The higher the court, the more likely that the broader context will be used, at least in part, because of the resources available to the higher courts that are not available to the lower. Presently, there is considerable disagreement among the Wisconsin justices on what the context should be, more so in the interpretation of statutes than in the interpretation of the constitution.

See the following explanation from AmJur:

"73 Am Jur 2d STATUTES § 85 Legislative proceedings in adoption of law; legislative history.

Apart from opinions expressed in debates, n1 the actual proceedings of the legislature, or the steps taken in the enactment of a law, or the history of the passage of the law through the legislature, may be resorted to as an aid in the interpretation of a statute. n2 However, as a general rule, where the statutory command is straightforward, there is no reason to resort to legislative history. n3 Or, as otherwise stated, there may be no

resort to the legislative history of the enactment of a statute, however, if the language is plain and unambiguous, n4 since such legislative history may only be resorted to for the purpose of solving doubt, not for the purpose of creating it. n5 When statutory language is explicit, legislative history simply corroborates the obvious meaning of the language used in the law. n6

However, where the meanings of the words used in the acts in question are doubtful, n7 the terms of the statute are to be interpreted in the light of its historical background, n8 and the courts may avail themselves of such aid as may be afforded by historical facts, n9 or by antecedent n10 or contemporaneous n11 legislative history, or by the history of the statute. n12 Thus, in interpreting a federal statute which is a substantial reenactment of an earlier statute, the United States Supreme Court will, where the legislative history of the later statute is scant, look to the history of the earlier statute. n13

In addition, when a statute is challenged because the object to be accomplished is prohibited or a prohibited route is selected to reach a permissive destination, it is proper to look at the legislative background to ascertain legislative intent. n14 Indeed, where the plain language of a statute appears to settle the question presented, the United States Supreme Court will look to the statute's legislative history to determine only whether there is a clearly expressed legislative intention contrary to that language, which would require the court to question the strong presumption that Congress expresses its intent through the language it chooses. n15 ....

To ascertain legislative intent in enacting a statute the language of which is of doubtful or ambiguous import, resort may be had to the journals or other legislative records showing the history in the legislature of the act in question while it was in process of enactment. n18"

"73 Am Jur 2d STATUTES § 86 Limitations upon use of legislative history.

The meaning of a statute is not conclusively established by legislative history. n1 Moreover, the legislative history of a statute may not compel a construction at variance with its plain words, n2 and where the language of a statute is unambiguous, consideration of the history of the legislation has been found impermissible. n3 Although it has been declared that the legislative history of an act becomes important only in extremely doubtful matters of interpretation, n4 there is also authority to the effect that in order to effectuate the legislative purpose of a statute it is proper to consider, in addition to the literal words of the statute, the historical setting which gave impetus to its enactment. n5 In any event, the legislative history of an act passed a long time after another act does not afford any aid in the interpretation of the earlier statute. n6 In addition, for purposes of statutory construction, material not available to lawmakers is not considered, in the normal course, to be legislative history; after−the−fact statements by proponents of a broad interpretation are not a reliable indicator of what Congress intended when it passed the law, even if it is assumed that extratextual sources are to any extent reliable for this purpose. n7"

"73 Am Jur 2d STATUTES § 87 Changes in statute in the course of enactment; rejected provisions.

In the interpretation of a statute, arguments sought to be founded upon the various phases assumed by the several provisions of the act in its passage through the legislature have sometimes been regarded as being of no consequence.1 In some cases, however, amendments of bills or changes made therein during the course of passage in the legislature, as disclosed by the records thereof, have been regarded as properly considered by courts interpreting doubtful or ambiguous provisions of the statute. 2

In the interpretation of a statute of doubtful import, the fact that a provision originally in a bill is omitted from the act as finally passed by the legislature has been regarded as a significant factor. 3 Thus, the rejection by the legislature of a specific provision contained in an act as originally reported has been found most persuasive to the conclusion that the act should be so construed as in effect to exclude that provision, 4 at least where there is a basis for the assumption that the words omitted were deemed to be mere surplusage. 5

The rejection by the legislature of amendments to existing legislation has been found to be a significant circumstance by some courts, 6 while others regard it as a circumstance to be weighed along with other circumstances where the choice is nicely balanced. 7 Other courts have decided that, in construing a statute, rejected alternative legislation may not be considered, 8 or, at least, should be given little weight. 9”

However, the Wisconsin Supreme Court treats decisions of other state courts as sometimes informative but definitely not controlling. The Bashford case is still cited.

“The people then made this constitution, and adopted it as their primary law. The people of other states made for themselves respectively, constitutions which are construed by their own appropriate functionaries. Let them construe theirs − let us construe, and stand by ours. Attorney General ex rel. Bashford v. Barstow, 4 Wis. 567.”

Here are some examples of rejections being used or not used by the Wisconsin Supreme Court to determine intent:

“[*P32] In 1995, Wisconsin voters were presented with another opportunity to amend Article VII, Section 10; however, this time they declined to do so. In April 1995, Wisconsin voters rejected a referendum under which the phrase “during the term for which elected” would have been eliminated from Section 10(1). See 1995 Assembly Joint Resolution 15. Because the referendum failed, though, the phrase “during the term for which elected” remains part of the constitution.”

Wagner v. Milwaukee County Election Comm’n, 2003 WI 103, P34 (Wisc., 2003).

“[*P26] Aside from this court’s pronouncement in Holytz that common law unaltered by legislation remains within the province of the judiciary to develop, the decision not to treat a legislature’s failure to enact a bill overriding the common law as indicative of legislative intent is further supported by considerations of the legislative process itself. As the Sorensen decision explains, “Nonpassage of a bill is not reliable evidence of legislative intent, for it may have failed” for a variety of nonpolicy reasons, such as insufficient time, the agenda−setting maneuverings of legislative leadership, the efforts of special interests, or lobbying efforts at a committee or floor level. n30

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n30 Sorensen, 119 Wis. 2d at 634−35."

State v. Picotte, 2003 WI 42, P28 (Wisc., 2003).

"III [*P10] We first address the standards of review applicable in this case. The constitutionality of a statute presents a question of law that this court reviews de [**530] novo, without deference to the decisions of the circuit court or the court of appeals. n6 Aicher v. Wis. Patients Comp. Fund, [***333] 2000 WI 98, P18, 237 Wis. 2d 99, 613 N.W.2d 849; State v. Post, 197 Wis. 2d 279, 301, 541 N.W.2d 115 (1995); Szarzynski v. YMCA, Camp Minikani, 184 Wis. 2d 875, 883−84, 517 N.W.2d 135 (1994); State v. Fisher, 211 Wis. 2d 665, 669, 565 N.W.2d 565 (Ct. App. 1997); Prof. Guardianships, Inc. v. Ruth E.J., 196 Wis. 2d 794, 801, 540 N.W.2d 213 (Ct. App. 1995). This case requires us to interpret the constitutional amendment, seeking an indication of the framers' intentions. As we have noted:

The purpose of construction of a constitutional amendment is to give effect to the intent of the framers and of the people who adopted it; and it is a rule of construction applicable to all constitutions that they are to be construed so as to promote the objects for which they were framed and adopted. Kayden Indus., Inc. v. Murphy, 34 Wis. 2d 718, 729−30, 150 N.W.2d 447 (1967) (quoting Ekern v. Zimmerman, 187 Wis. 180, 184, 204 N.W. 803 (1925)) (internal citations and quotations omitted). For these purposes, this court has established that we should utilize three sources to determine a provision's meaning: the plain meaning of the words in the context used; the constitutional debates and the practices in existence at the time of the writing of the constitution; and the earliest interpretation of the provision by the legislature as manifested in the first law passed following adoption. [**531] Thompson v. Craney, 199 Wis. 2d 674, 680, 546 N.W.2d 123 (1996) (citations omitted)."

State of Wisconsin v. Phillip Cole, 2003 WI 112; 264 Wis. 2d 520; 665 N.W.2d 328.

"[*P42] The final source this court is to consider in construing a constitutional amendment is the first related legislation passed after the amendment was ratified. In this case, the main statute of interest was passed long before the constitutional amendment was drafted.

However, there is some legislative action that is of interest in our inquiry. As the amendment went through the drafting process to the present time, efforts have been made to pass laws creating a licensing system [**553] for the carrying of concealed weapons. It has been proposed that Wis. Stat. § 941.23 be amended. 2001 S.B. 357; 2001 A.B. 675. However, such proposals have not yet been successfully passed into law. The attempts, though, suggest that the legislature believes the concealed weapons law is still intact. Were the right to bear arms intended to repeal the CCW statute, as Cole suggests, citizens would already have the right under the amendment to carry concealed weapons."

State of Wisconsin v. Phillip Cole, 2003 WI 112; 264 Wis. 2d 520; 665 N.W.2d 328.

If you have any questions or would like to redraft any of the amendments, please contact me.

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